1941

Present : **Keuneman and Nihill JJ.**

GABRIAL *v.* ADIKARAN.

64—D. C. Avissawella, 2,637.

Pactum antichresis—*Stipulation attached to pact—No right to redeem before certain data—Stipulation void—Roman-Dutch law.*

A stipulation attached to a *pactum antichresis*, that the mortgagor should not redeem the property or repay the debt before a certain time, is void.

THIS was an action brought to redeem a usufructuary mortgage bond dated February 24, 1936. The defendant pleaded that the mortgagor was not entitled to redeem the bond so long as "the control" lasts, *i.e.*, till December 31, 1938—a defence based on a clause in the bond to that effect. The learned District Judge held that the stipulation was void for want of mutuality and as being vague.

Gilbert Perera, for defendant, appellant.—Plaintiff seeks to cancel the usufructuary mortgage bond P 1 on the ground that payment was tendered and was not accepted by the defendant. Two issues were raised at the trial but the learned judge had decided on other issues that had never been raised and the defendant had been prejudiced thereby. Further, the learned Judge has held that the stipulation, viz., that the obligors undertook "not to redeem the mortgage as long as the control lasts", was not enforceable for "want of mutuality" and "vagueness". The doctrine of "want of mutuality" is not known to the law of mortgage but to specific performance which is not applicable to Ceylon. The bond was entered into in 1936 when the Rubber Control Ordinance of 1934 was in force and that Ordinance was operative for the period ending December 31, 1938. Hence the period stipulated is not vague.

N. Nadarajah, for plaintiff, respondent.—The issues are wide enough to take in the questions adjudicated by the Judge. The period is vague because it is not known how long the Government will continue the rubber control.

This bond amounts to a *pactum antichresis*. In such a pact the stipulation limiting the right to redeem is void. *Wille on Mortgage p. 172; Burge, vol. III., p. 198; McCullough and Whitehead v. Whiteaway & Co.*

Gilbert Perera, in reply.—The argument for the respondent is based on the fallacy that the *pactum antichresis* is a usufructuary bond. It is not so. *Voet* defines it as follows—" *Antichresis, id est, mutuus pignoris usus pro credita" Bk XX., tit 1, s. 23.* The word used is " usus " not " usufuctus ". *Usus* merely creates a " naked use " of property. *Institutes of Justinian, (Bk. II., Tit. V.)* at para 1 Justinian says (*Sandars Translation*) " But, of course, the right of use is less extensive than that of the usufruct; for he who has the naked use of lands, is not understood to have anything more than the right of taking herbs, fruits, flowers . . . . sufficient for his daily needs ".

The Roman-Dutch jurists knew well the technical differences of these terms and would not have used " usus " where " usufructurs " should have been used.

The law relating to *pactum antichresis* is quite intelligible as it is not within reason that a person who has a " naked use " should have the right to prevent the right to redeem. A usufructuary is in a far different position.

The law relating to *pactum antichresis* is a departure from the general law and therefore the Court should construe the law strictly so as not to give it a wider scope than was intended by the jurists.

Cur. adv. vult.

January 21, 1941. KEUNEMAN J.—

By usufructuary bond D 1, No. 683 of February 24, 1936, three persons, Kapuranhamy, Gunawardena and Ratranhamy, mortgaged the allotment of land Mahahena, described in the plaint, to the defendant. The same three persons transferred the entirety of the premises to the plaintiff, subject to settlement by the plaintiff of the amount due on the bond D 1. In his plaint, dated November 28, 1938, the plaintiff claimed the cancellation of the bond, on bringing the money due into Court. The defendant in her answer stated that the mortgagor was not entitled to redeem the bond till December 31, 1938. This defence was based upon a clause appearing in D 1 as follows: " We the said obligors do hereby undertake not to redeem the said mortgage bond as long as the control lasts ". " *The control* " clearly refers to " rubber control ", and the defendant pleaded the Rubber Control Ordinance of 1934 expired on December 31, 1938.

The case proceeded to trial on two issues :—

" 1. Did the plaintiff tender to defendant the amount due on the bond as stated in the plaint ?

2. Was the plaintiff entitled in law to have the bond redeemed before December 31, 1938 ?

[1] *S. A. Law Reports (1914) App. Div. 599 at p. 626*

The learned District Judge decided both issues in favour of the plaintiff. The second issue is in very wide terms, and the District Judge decided that the stipulation in question was void on two grounds, namely, for want of mutuality and also owing to its being too vague.

I do not think it is necessary to decide either of these two points. A further legal argument has been addressed to us by Counsel for the respondent which does not involve the examination of any facts not already recorded, and which falls within the terms of issue 2. Under D 1, the right was given to the mortgagee "to possess the same in lieu of interest and also to take and receive the rubber coupons allotted to the said land in lieu of interest". Counsel argued that this was a *pactum antichresis.* Counsel cited *Wille on "Mortgage and Pledge in South Africa", p. 188,* where in relation to a pact that the mortgagor shall not redeem the property or repay the debt before a certain date it is stated:—"This clause is invalid if it is annexed to a *pactum antichresis*". Two authorities are cited. *Sande, Decis, Fris. (3, 12, 11)* is unfortunately not available to me, but *Burge (Vol. III., p. 198)* sets out this proposition as follows:—"But if to this contract of *antichresis* were added a stipulation that the mortgage should not be paid off for a certain length of time, it would be void". Further, this position has been accepted (though perhaps *obiter*) in *McCullough and Whitehead v. Whiteaway & Co.*[1]

Counsel for the appellant argued that under the deed D 1 a *usufruct* and not a *use* was reserved, and that this did not constitute a *pactum antichresis.* He depended on *Voet (20, 1, 23—vide Berwick's Voet, p. 299)* which states:—"By the *pactum antichresis,* which is specially approved in mortgages, it is agreed that the creditor shall have the use of the thing mortgaged in place of interest until payment of the debt, whether he chooses to enjoy the benefits or take the fruits for himself, inhabiting the house or cultivating the farm mortgaged, or prefers to hire it to others". In my opinion, there is sufficient internal evidence in the passage itself to show that when *Voet* employed the word "*usus*" he was not drawing the technical distinction between "*usus*" and "*usufructus*". I think the matter is put beyond doubt by the passage in *Kotze's van Leeuwen (4, 12, 15, 2nd ed., Vol. II., p. 87),* to wit:—"The stipulations in pledge and mortgage were various, of which, besides the general stipulation, this one alone is in use among us, namely, that the fruits of the property pledged shall go to the creditor for the interest of the principal sum which is due to him, if only the debtor retains the power of at all times redeeming his property". It is to be noted that Walter Pereira in his *Laws of Ceylon (2nd ed., p. 514)* uses this passage as an illustration of the *pactum antichresis.* I may add that the last words in the passage cited appear to me to be in accord with the passage quoted from *Wille (supra),* and the authorities on which it is based.

On this point alone, the respondent is entitled to succeed, and I accordingly dismiss the appeal with costs.

NIHILL J.—I agree.

Appeal dismissed.

[1] *S. A. Law Reports (1914) App. Div. 599 at p. 626.*